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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 567

JACK F. LYLE,

Petitioner,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, A CORPORATION, AND GULF, COLORADO AND SANTA FE RAILWAY COMPANY, A CORPORATION,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI AND IN OPPOSITION TO THE BRIEF SUPPORTING SAID PETITION.

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February 21, 1950.

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

The only question to be considered is whether an appropriate ground exists for the issuance of a writ of certiorari. Petitioner has failed to show that the court below rendered a decision in conflict with another court of appeals on the same matter; or decided a federal question in a way probably in conflict with applicable decisions of

this Court; or so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Rule 38(4)(b).

Counsel seemingly have failed to perceive the elementary distinction between an extended argument on the merits and an argument on the issue of whether certiorari should or should not be granted. They have included many facts which have no bearing on the limited question here involved. In addition, many of their purported statements of fact are not supported by the record. For these reasons, we feel that a restatement of the case, confined to accurate facts material to a consideration of the petition, might be helpful to the Court and take the liberty of restating it as follows:

A SUMMARY STATEMENT OF THE CASE.

The petitioner was employed at Gainesville, Texas, as a hostler's helper by the respondent Gulf, Colorado and Santa Fe Railway Company (Tr. 18). A "hostler's helper" is not really a hostler's helper. That is to say, a hostler drives locomotives in railroad yards and roundhouses. He is a yard engineer (Tr. 48). A hostler's helper supplies locomotives with sand, water, and fuel oil, fills the lubricating valves, supplies waste for the engine (Tr. 19), and cleans up any oil or grease on top of the tender or elsewhere on the locomotive (Tr. 48). He "services" the locomotives (Tr. 34), but does not participate in any way in their movement. Neither man helps the other in the performance of his duties, so that the designation "hostler's helper" is a misnomer (Tr. 48).

When a locomotive pulls a train into Gainesville, the road engineer and fireman are through with the engine. They go home (Tr. 20). A hostler then takes over the locomotive and moves it to the roundhouse or elsewhere in the yards.

January 10, 1946, Engine 3939, which is owned by the respondent Atchison Company but operated into Gainesville by employees of the respondent Gulf Company (Stipulation, Tr. 44), completed a run about 8 o'clock P. M. The engineer and fireman left the engine and the hostler got up in the cab and moved the locomotive (which had been detached from the train) to the sand chute near the roundhouse, where petitioner filled the sand dome (Tr. 21). The engine was then moved to the service track opposite the water spout, where petitioner filled the tank with water (Tr. 24). The engine was then moved up about 25 feet where petitioner placed oil in its tank (Tr. 25). The hostler then moved the engine to the inspection pit, also near the roundhouse, where it was stopped (Tr. 26).

The hostler left the locomotive after this movement, and thenceforth the petitioner was the only person on or about the engine. At this place at the pit, petitioner, on the ground, checked the lubricators on the engine. He found it necessary to go to an oil house nearby to get some oil for the lubricators and waste for the engine (Tr. 26, 27). After he had taken care of the lubricators, petitioner started into the roundhouse and happened to think about having noticed, while he was on top of the tender of the locomotive servicing the oil and water, a bucket and a journal-box-lid hook that were out of place on top of the tender. He climbed back on to the tender, placed the bucket and hook in their places, and then started down through the cab (Tr. 28).

A person descends from the top of a tender to the deck of a locomotive cab—a distance of about five feet—by means of two fan-shaped iron steps (Tr. 29), roughly about the size of a man's foot (Tr. 52). On either side of these steps is a hand rail or grab iron for a person to use in ascending or descending (Tr. 30). It was while descending these steps that plaintiff in some manner fell and hit his left elbow either against the end of the tender or against the deck of the locomotive cab, resulting in a fracture of the olecranon process of the left ulna.

As we have seen, at the time of the accident, the engine had been abandoned at the inspection pit so that the petitioner could complete his work thereon. He was the only person on or about the locomotive at the time, and the true facts surrounding the injury are known apparently only by him.

The complaint as originally filed alleged the occurrence as follows: That petitioner "went to the top of the water and fuel tank of said engine to remove a journal lid hook and pail a [*sic*] journal waste and after completing said work, proceeded to leave the top of the water tank and

to step on the steps provided at the end of the tank between the engine cab and the tender, and while he was descending said steps and holding on to the grab iron, *he was caused to slip due to oil and grease which he had accumulated on his shoes while on top of the water and fuel tank,* and he was caused to strike his elbow and fall to the deck of the cab of the engine" (Tr. 4) [Emphasis supplied].

Subsequent to the filing of the complaint, the petitioner's deposition was taken for discovery purposes (Tr. 67), at which time petitioner swore that he had carried a flashlight to the top of the tender with him and had inspected the top of the tender and found it all oily (Tr. 67); that the oil was formed all over, but the biggest puddle was around where "they" [he, himself] put it in there (Tr. 68). He testified on his deposition that he had put the oil in the locomotive and that it was one of his duties to clean up excess oil like that (Tr. 68). In regard to the steps, *petitioner testified on deposition that he did not notice their condition with respect to oil or grease* (Tr. 69).

After the deposition had been taken, petitioner, fearing the outcome of his suit since his own negligence had been thus established, amended his complaint. In lieu of the original allegation regarding the occurrence, the amendment alleged that as petitioner proceeded to leave the top of the water tank and to step on the steps provided at the end of the tank between the engine cab and the tender, he was caused to slip on oil and grease and to strike his elbow and fall (Tr. 14).

On the trial, petitioner, the only occurrence witness, testified that as he started to get down from the top of the tender, holding on to the grab irons with both hands, his right foot slipped off the step (Tr. 30, 31). He testified that he fell to the floor of the cab and landed on his left

elbow (Tr. 32); that after he had fallen he looked at the step and saw some thick, heavy, blackish-looking grease on the bright metal step; that the step was nearly covered with grease a half-inch thick (Tr. 32-3). He gave this unequivocal testimony after having sworn under oath that he did not notice the condition of the step with respect to oil or grease (Tr. 69).

Further, at the trial petitioner testified, as he had on deposition, that it was his duty as a hostler's helper to clean up any oil, grease or foreign substance on or about the locomotive. This duty was not limited to cleaning up oil or grease only if reported by the foreman, as counsel suggest (Pet. Br., p. 14). See Tr. 49, 68, 142, also opinion of court below.

Eight distinct acts of negligence were charged in the complaint, but they were all abandoned at the trial, and at the completion of all the testimony counsel for petitioner announced that he was submitting his case solely on the issue of violation of the Boiler Inspection Act (Tr. 170) in that respondents had permitted grease, oil, or foreign substance to be and remain upon the step. All of the court's instructions were based solely on the alleged Boiler Inspection Act violation, and no instructions pertaining to negligence were given (Tr. 171). Petitioner took no exception to the omission of negligence charges.

Respondents, at the conclusion of all the evidence on the trial, made timely motions for directed verdict and renewed their earlier motions to strike from the complaint the allegations pertaining to violation of the Boiler Inspection Act on the ground that the Act was not applicable to this cause for the reason that at the time of the alleged occurrence the locomotive in question was not in use (Tr. 155, 156, 158).

Those motions were denied (Tr. 159).

REASON RELIED ON FOR DISALLOWANCE OF WRIT.

The only thing which was decided by the Court of Appeals was that a locomotive, withdrawn from use so that it may be serviced and placed in condition for further use, is not subject during that period of withdrawal to the penalties of the Boiler Inspection Act, since it is not during such withdrawal *in use on the line* and *employed in active service,* as those terms are used in the Act.

As we shall proceed to demonstrate, this uncomplicated proposition of law is so well established by the authorities that there exists no perceptible reason for a review of the decision below.

THE LAW.

The BOILER INSPECTION ACT, 45 U. S. C. A. 23, provides that:

> "It shall be unlawful for any carrier *to use* or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof, are in proper condition and *safe to operate* in the service to which the same are put, that the same may be *employed in the active service of such carrier* without unnecessary peril to life or limb, * * *." [Emphasis supplied.]

SUMMARY OF ARGUMENT.

At the trial, the petitioner withdrew his allegations of ordinary negligence—having introduced insufficient proof to support them—and submitted his case solely on the alleged violation of the Boiler Inspection Act.

Since at the time of the accident, the locomotive had been withdrawn from service so that it could be supplied, "serviced," and made ready for another run, it was not *in use* or *employed in the active service,* as those two terms are used in the Boiler Inspection Act. Therefore, the provisions of the Boiler Inspection Act are not applicable, and there was no violation of that Act. *New York, C. & St. L. R. R.* v. *Kelly,* 70 F. 2d 548 (7th Cir. 1934), *cert. denied* 293 U. S. 595; *Sherry* v. *Baltimore & O. R. R.,* 30 F. 2d 487 (6th Cir. 1929), *cert. denied* 280 U. S. 555; *Baltimore & O. R. R.* v. *Hooven,* 297 Fed. 919 (6th Cir. 1924); *McCalmont* v. *Pennsylvania R. R.,* 283 Fed. 736 (6th Cir. 1922), *cert. denied* 260 U. S. 751; *Chicago & N. W. Ry.* v. *United States,* 168 Fed. 236, 238 (8th Cir. 1909); *Compton* v. *Southern Pac. Co.,* 70 Cal. App. 2d 267, 161 P. 2d 40 (1945); *Kaminski* v. *Chicago, M. St. P. & P. R. R.,* 180 Minn. 519, 231 N. W. 189, *cert. denied* 282 U. S. 872 (1930); *Harlan* v. *Wabash Ry.,* 335 Mo. 414, 73 S. W. 2d 749 (1934); *Brady* v. *Wabash Ry.,* 329 Mo. 1123, 49 S. W. 2d 24, *cert. denied* 287 U. S. 619 (1932); *Flack* v. *Atchison, T. & S. F. Ry.,* 285 Mo. 28, 224 S. W. 415, *cert. denied* 256 U. S. 90 (1920).

Congress studiously limited the application of the absolute requirements of the Boiler Inspection Act to locomotives actually in use in the active service of the carrier. It did not declare unlawful the *ownership* or *loan* of a locomotive which is not in proper condition.

Since there is an unqualified duty to maintain locomotives in use in a condition which is not unsafe for those who are required to use them in active service, Congress logically contemplated that a locomotive could only be placed in such a condition of safety by taking it out of use and effecting proper repairs and services. *Chicago & N. W. Ry.* v. *United States,* 168 Fed. 236 (8th Cir. 1909).

During the time that a locomotive is withdrawn from use for servicing or repairs, a carrier's duty is limited to one of ordinary care under the general provisions of the Federal Employers' Liability Act. *Compton* v. *Southern Pac. Co.,* 70 Cal. App. 2d 267, 161 P. 2d 40 (1945); *Brady* v. *Wabash Ry.,* 329 Mo. 1123, 49 S. W. 2d 24, 29, *cert. denied* 287 U. S. 619 (1932); *Harlan* v. *Wabash Ry.,* 335 Mo. 414, 73 S. W. 2d 749, 758 (1934); *Ehalt* v. *McCarthy,* 104 Utah 110, 138 P. 2d 639, 644 (1943).

The ruling of the court below is correct, and petitioner has advanced no valid reason for the allowance of a writ of certiorari. Rule 38(4)(b).

ARGUMENT.

The Locomotive Was Not in Use in Active Service. Therefore, the Boiler Inspection Act Is Not Applicable.

Since petitioner relied entirely for recovery upon a violation of the Boiler Inspection Act, we contend that the Court of Appeals was correct in reversing a verdict and judgment for petitioner, because at the time of the alleged occurrence Engine 3939 was not in use in active service. In other words, there was no violation of the Act.

As we have indicated, prior to the accident the engine crew had left the engine in the yards at Gainesville, upon completion of its run (Tr. 20). Servicing was necessary before the engine could make another trip, and a hostler moved the engine to the service track and inspection pit, all near the roundhouse, for such servicing (Tr. 21). It was petitioner's duty to undertake the servicing of this locomotive. His duties as hostler's helper required him to put sand, oil, and water in the engine, to fill up the lubricator, to clean up any excess oil or grease on or about the locomotive, and to do anything else that the engine needed (Tr. 48-49). He serviced the engine while it was at the roundhouse (Tr. 22, *et seq.*). The hostler who moves or drives the engine usually or normally leaves the engine after it has been moved to the roundhouse for servicing, and in this case the hostler in fact had left the engine (Tr. 49). There was no reason for the engine to be moved or for the hostler to return to the engine until after petitioner would have completed his work (Tr. 50). The engine was not coupled to any cars or other engines; it was standing all by itself and was not moving (Tr. 49).

At the time of the occurrence, no one except the petitioner was on or about the engine (Tr. 49). While undergoing this servicing, the engine admittedly was being made ready for another run. However, from all that appears, no other run was ever made. Assuming that it did make another run, there is no showing whether that run was made the next day, the next week, or the next month. Obviously, it was out of service and could not have been put back into use until all of the necessary servicing had been completed, for as everybody knows an engine cannot run without fuel, water, and other supplies.

As aptly stated by the court below, 177 F. 2d 221, 223 (Tr. 184):

> "* * * It is opposed to reality to say that under such circumstances the locomotive was in use so that the mandatory duty imposed by the Boiler Inspection Act then applied. To service an engine while it is out of use, to put it in readiness for use, is the antithesis of using it. To apply the mandatory liability in favor of one who puts an engine in readiness for use is to enlarge and extend the intent of Congress in enacting the legislation.
>
> "This conclusion * * * is in line with the decisions of other courts, both state and national, interpreting the provisions of this statute. * * *
>
> "* * * it seems clear to us that there is but one answer to the question presented and that is that the locomotive in question was not in use within the meaning of the Boiler Inspection Act at the time of the injury. Consequently plaintiff failed to make out a *prima facie* case."

On these facts there can be no denial that at the time of the occurrence, Engine 3939 had been taken out of service and moved to the roundhouse to be serviced and readied for another run. The engine necessarily was not "in use," and therefore the Boiler Inspection Act is not applicable.

The Act does not declare unlawful the *ownership* or the

borrowing of a locomotive which is not in proper condition and safe to operate. The prohibition is against the *employment in the active service* of such a locomotive.

Neither does the Act apply to locomotives when temporarily withdrawn from active use, even though they are intended to be again and shortly put in such active use.

Flack v. *Atchison, T. & S. F. Ry.*, 285 Mo. 28, 224 S. W. 415 (*cert. denied* 256 U. S. 90) (1920), was a suit under the Federal Employers' Liability Act for the death of a boiler foreman while inspecting and attempting to repair a locomotive boiler. There was a verdict and judgment for plaintiff, which was reversed by the Supreme Court of Missouri. At the time of the accident the engine was in defendant's roundhouse. Even though the Boiler Inspection Act was not brought into the case until after argument in the Missouri Supreme Court, the court waived the tardy appearance of this suggestion, and overruled it because, as the court said (p. 423):

> "At the time of the accident here in suit, the engine in question was not being used in 'moving interstate or foreign traffic,' nor was it 'in the active service of such carrier in moving traffic' within the intent and purpose of that act, as we construe it. The engine was undeniably being prepared for use in interstate traffic, and the deceased met his death while engaged in that preparation. The work then being done was necessary in order to avoid a violation of the provisions of the act whose penalties [plaintiff] now invokes."

The SAFETY APPLIANCE ACT (45 U. S. C. A. 1, *et seq.*) has a prohibition similar to that contained in the Boiler Inspection Act. It provides that it shall be unlawful for a common carrier "*to haul* or *permit to be hauled* or *used on its line* any car subject to the provisions of this Act not equipped with" appliances provided for therein. The duty imposed upon railroads by that Act, like the duty

under the Boiler Inspection Act, is an absolute, unqualified one. The courts, Federal and State, have interpreted the two acts similarly.

The leading case on the nonapplicability of the Boiler Inspection and Safety Appliance Acts to locomotives and cars temporarily withdrawn from use for repairs or servicing is *Baltimore & O. R. R.* v. *Hooven*, 297 Fed. 919 (6th Cir. 1924). There, as the court itself stated in the opinion, a locomotive had been temporarily withdrawn from service and was undergoing minor repairs in a roundhouse "in preparation for early return to service." The purpose of the withdrawal was so that the engine could undergo its regular monthly inspection and so that certain running repairs could be made. As was the custom as to engines brought into the roundhouse, this locomotive was sprayed with oil for the purpose of conditioning it and protecting it from rust. The oil had not been removed, and as a consequence, Hooven, a machinist, descending after making minor adjustments on top of the boiler, slipped in stepping from the end of a steel running board, where the oil had been left, and fell from the engine. As stated by the court (p. 920): "At the time of the accident the engine was about ready for service, and *was called to go out* on the road shortly thereafter." Plaintiff had judgment below, which was reversed on appeal, the Circuit Court of Appeals stating the question to be: "Is it the intent of the Act to have the absolute liability imposed by it attached to the vehicle during such time as it is withdrawn temporarily from actual service, and after it has reached the place of repair and is undergoing conditioning and repair for the purpose for which it is intended and for the use to which it is assigned?" Said the court (p. 922):

> "* * * In actions under the Safety Appliance Act the statutory criterion is whether the car is 'in use' 'on its line,' within the true purpose and scope of the

act. * * * When we regard the reasons upon which the broad extent of the act has been upheld and its constitutionality sustained, it is difficult to see wherein the safety of a highway of interstate commerce may be endangered by a locomotive withdrawn from service and at rest in a stall of the railroad's roundhouse undergoing repairs, even though such withdrawal be but temporary.

"* * * the act of repairing an appliance which becomes defective in use * * * [is an act] in compliance with and not in violation of law, and is not in our judgment [an act] which the law intends to penalize. The process of conditioning an engine and preserving it from deterioration through rust by spraying it with oil appears to be * * * the usual and necessary treatment of the engine during monthly inspection, contributing to the safety of the apparatus while in actual use. If during such treatment the safety appliances are rendered temporarily insecure by the presence of oil upon them, it does not seem to us to present a condition that comes within the purview of the act, when as in this case the engine is completely withdrawn from all relationship to the highways of interstate commerce, and from all connection with the movement of trains thereon.

"* * * it becomes the clear duty of the carrier in conformity with [the purpose of the Safety Appliance Act] to exercise a high degree of diligence in discovering and repairing defects in its safety appliances and in withdrawing the car from commercial use while they exist. Such diligence seems also to be imposed on the carrier by the Boiler Inspection Act. * * * Can it be said that it is the intention of the Safety Appliance Act to penalize such diligence by extending the absolute liability of the carrier through the period of replacement and repair, and reaching even a case where the insecure condition of the appliance which failed was the natural and temporary result of the reconditioning process? We think such contention untenable, unless supported by specific direction of the statute.

"* * *

"It will be observed that it is within the contemplation of the statute that safety appliances will become defective, and that such defects will necessitate withdrawal from service of the defective car while repairs are being made, and for that purpose the penalty of the statute is for the time being lifted."

The court concluded (p. 924) that the Act was not applicable, it having found no cases from which any holding may be inferred to the effect that equipment at rest and not in relation to movement of other cars is subject to the penalties of the Act. Said the court (p. 924):

"* * * The plaintiff based his right to recover for his injury solely upon the absolute liability claimed to be imposed upon the defendant by the Safety Appliance Act, and it was on this theory that it was submitted to the jury by the trial court. * * * This being so, the District Judge erred in denying the defendant's motion for a directed verdict. * * *"

To the same effect is the opinion in *McCalmont* v. *Pennsylvania R. R.*, 283 Fed. 736 (6th Cir. 1922) (*cert. denied* 260 U. S. 751). There, the Circuit Court of Appeals said (p. 739):

"* * * In the present case no hauling was in progress or in immediate contemplation. The car was wholly out of present use. The original putting on of the chain and the further adjustment of the chain were in the nature of temporary repairs which would permit the car to be taken to the shop. * * * Fully remembering that the benefits of the act are not confined to those who were actually trying to couple at the moment of the injury, still it does not follow that they extend to one who is merely putting the couplings in condition for a use which, though it may come soon, is distinctly of the future and not of the present."

Sherry v. *Baltimore & O. R. R.*, 30 F. 2d 487 (6th Cir. 1929) (*cert. denied* 280 U. S. 555), was another action

under the Safety Appliance Act. The plaintiff was a car inspector whose duty it was to inspect bad order cars, to make such repairs as could be made on the ground, or to order the car to the repair shops for that purpose. One car had been placed upon a ladder track in the general yard, cut from the train, and reported to plaintiff as having a defective brake. In order to determine whether the brake was operative, having previously discovered that the car had a badly bent brake staff, plaintiff mounted to the top of the car and attempted to apply the brake. The brake staff broke and threw plaintiff to the ground. At the trial, a verdict was returned for the defendant on the ground that the car was not in use or being hauled, and, therefore, the provisions of the Safety Appliance Act were not applicable. That judgment was affirmed. Said the court (p. 488):

"* * * The remedy is statutory, and liability, where the statute attaches, is absolute and independent of negligence.

"* * * The absolute liability above referred to is implied from these statutory provisions, and it is to be noted that *the inhibited act* on the part of the railroad company in each *is 'the hauling or permitting to be hauled or used'* on its line any car with the required equipment, in defective condition. This constitutes the 'violation of the act' we have above referred to in statement of the general principles deduced from precedent. It has accordingly been held by this court that *the act has no application to equipment withdrawn from service and undergoing minor repairs preparatory to early return to service. B. & O. R. Co.* v. *Hooven* (C. C. A.) 297 F. 919. Cf. *McCalmont* v. *Pennsylvania R. Co.* (C. C. A.) 283 F. 736.

"In the instant case the defective car was not being hauled or used by the defendant, except in that it was stored temporarily upon one of the ladder tracks. It had been withdrawn from use for the very purpose of undergoing repair. No movement was immediately

contemplated, and no action of setting the brakes was necessary, save as incident to inspection and repair. * * *

"* * * The defectively equipped car not having been in use within the meaning of the Safety Appliance Act, at the time of injury to the plaintiff, the verdict was properly directed for the defendant, and the judgment rendered thereon is affirmed." [Emphasis supplied.]

New York, C. & St. L. R. R. v. *Kelly*, 70 F. 2d 548 (7th Cir. 1934) (*cert. denied* 293 U. S. 595). Plaintiff was a field brakeman in a yard crew who sustained a personal injury due to the absence of a grabiron at the top of the side ladder of a freight car. The car from which he fell was on the repair track for repairs. The vital question was whether or not a freight car removed from the service to the extent it is taken out of actual service and put on the repair tracks for specified repairs is "in use" within the meaning of the Safety Appliance Act. The Circuit Court of Appeals was of the opinion that it is not, and reversed a judgment for plaintiff. Said the court (p. 550):

"After a defective car reaches the place of repair, the Safety Appliance Act is inapplicable because such car has been withdrawn from service and is not 'in use' under the provisions of the act, nor does mere shifting of cars within the place of repair put the car 'in use' within the meaning of the statute. [Citing cases.]"

Further from the opinion (p. 551):

"Had the car in question been en route to the repair place, a different situation would have been presented, but after it reached the repair place, was out of service, the carrier was entirely within its rights in taking off the handhold or any other of the safety appliances necessary to effect the repairs, without violating the Safety Appliance Act.

"Since it is so clear that the car was not in use, it was erroneous to submit the case to the jury; * * *"

Kaminski v. *Chicago, M. St. P. & P. R. R.*, 180 Minn. 519, 231 N. W. 189 (*cert. denied* 282 U. S. 872) (1930). Plaintiff, a rear brakeman (switchman), was injured in a heavy repair yard—a yard to which freight cars needing extensive repairs are taken, and which is used only for making repairs. Plaintiff attended to the making of couplings of a cut of cars. When the couplings were completed he was standing on the right-hand side of the rear car and gave a signal to go ahead. As the cars began to move, he put his left foot in the stirrup and grasped a grabiron, which came off, causing him to fall to the ground. Since the grabiron was to be removed, the nuts had been burned off and the grabiron simply rested on the ends of the bolt with nothing to hold it in position. Plaintiff had a verdict and judgment below, but this was reversed by the Supreme Court of Minnesota. The court relied upon *Baltimore & O. R. R.* v. *Hooven* and *Sherry* v. *Baltimore & O. R. R.*, *supra*, and reached the conclusion that "where a bad order car has been withdrawn from service and taken to and placed in a repair yard where it is being repaired, subsequent movements of the car made in the course of the work and for the purpose of facilitating it are not within the operation of the Safety Appliance Act."

Harlan v. *Wabash Ry.*, 335 Mo. 414, 73 S. W. 2d 749 (1934). This was a suit under the Boiler Inspection Act. The engine in question had come in from the west, and was put on the "go out" track for the purpose of hauling a train east at about the middle of the afternoon. The plaintiff and his superior, a machinist, were to repair the locomotive stoker. Since they could not open the stoker in the yards, the afternoon run was cancelled and the engine was taken to the roundhouse. Thereafter, plaintiff and his superior went to this engine in the roundhouse, and it was here that plaintiff stepped into an open trapdoor in the locomotive cab and sustained his injury.

The case turned on the question of whether the engine, called for a run, was in use at the time of the occurrence, and in this connection the Supreme Court of Missouri had this to say (p. 753):

"Nor can plaintiff recover under the Boiler Inspection Act for the reason that the engine in question on which plaintiff was working when injured was not at the time in use or moving in interstate commerce, as we held in *Brady* v. *Wabash Ry. Co.*, 329 Mo. 1123, 49 S. W. (2d) 24, 29. * * * This act, like the Safety Appliance Act (45 USCA § 1 *et seq.*), while applicable only to interstate commerce, is narrower in its scope and application than is the Federal Employers' Liability Act. * * * The Boiler Inspection Act, like the Safety Appliance Act, does not rest on negligence, but is absolute in its requirements and is restricted to locomotive engines when in use in moving interstate traffic. It is only when in such use that the engine and appliances are required to be 'in proper condition and safe to operate in the service to which the same are put.' We pointed out in the *Brady* Case that the Safety Appliance Act, and the same is true of the Boiler Inspection Act, does not apply to cars or engines when withdrawn from active use in interstate commerce for temporary repairs, though intended to be again and shortly put in such active use; citing *Baltimore & Ohio Ry. Co.* v. *Hooven* (C. C. A.), 297 F. 919, 922, as holding that the absolute liability of a railroad for defective appliances does not 'follow its instrumentalities of transportation beyond their actual present use or hauling, or, more specifically,' it is not 'the intent of the act to have the absolute liability imposed by it attach to the vehicle during such time as it is withdrawn temporarily from actual service and after it has reached the place of repair and is undergoing conditioning and repair for the purpose for which it is intended and for the use to which it is assigned.' The opinion then adds: 'So we think such liability would not attach to the instrumentalities of transportation before their acceptance and actual present use or

hauling in such commerce. In the case mentioned, it was held that the defendant's liability under the Safety Appliance Act did not follow and cover an engine temporarily withdrawn from service for minor repairs, though in preparation for early return to service.' We also quoted from the *Hooven* Case as follows: 'The test of liability under the Safety Appliance Act must not be confused with the test of liability under the Federal Employers' Liability Act. • • • In actions under the Employers' Liability Act the statutory test is whether the employee of the interstate carrier is himself at the time engaged in interstate commerce; he is deemed to be so employed if he is working upon an 'instrumentality of interstate commerce'; and a car or engine is sometimes deemed to continue to be such instrumentality, even though it is not at the precise time active therein. In actions under the Safety Appliance Act the statutory criterion is whether the car is 'in use' 'on its line,' within the true purpose and scope of the act. The two tests are not synonymous.

"It follows from these rulings that under the facts shown here the engine in question was not in actual use in moving interstate commerce at the time of the plaintiff's injury, but was so far withdrawn from such active use as to make the provisions of the Boiler Inspection Act inapplicable."

Brady v. *Wabash Ry.*, 329 Mo. 1123, 49 S. W. 2d 24, *cert. denied* 287 U. S. 619 (1932), is quoted from at length in the *Harlan* case, just cited. A string of cars had been placed on an interchange track by another railroad, there to be inspected and either accepted or rejected by the Wabash (by whom Brady was employed). Brady's duties were to inspect these cars for safety-appliance defects, and he was injured by reason of a loose grabiron during his inspection of one of them. He based his action solely on the Safety Appliance Act. Since the Wabash, which had not yet accepted the car, was not using it on its line, recovery under the Act was denied.

Compton v. *Southern Pac. Co.*, 70 Cal. App. 2d 267, 161 P. 2d 40 (1945). Plaintiff, a roundhouse machinist, was working on a defective locomotive then in the roundhouse. Plaintiff sustained injury by steam which escaped from a defective check valve into the pump on which he was working, and sought to recover under the Boiler Inspection Act. The accident occurred at about 7:15 A. M., at which time the engine had been called for service at 8 A. M.; the locomotive had a fire in the firebox and steam up in the boiler. The trial court permitted the jury to decide whether at the time of the accident the locomotive was "in use" on defendant's line within the meaning of the Boiler Inspection Act. On appeal, this was held to be error, and a judgment for defendant was directed on the ground that as a matter of law the Act had no application, since at the time of the accident the locomotive was not in use on defendant's line within the meaning of the Boiler Inspection Act. After reviewing the cases cited herein by us, the court said (p. 45):

> "The several federal statutes imposing absolute liability on railway carriers for injuries caused by defective equipment all seem to have been drawn carefully to exclude such absolute liability while the car or engine is removed from actual service, even temporarily, for repairs. * * *
>
> "It will be noted that in not one of the absolute liability sections, except Sec. 4 [providing that it shall be unlawful for an interstate railroad carrier 'to use any car in interstate commerce' not provided with grab irons] does the statute apply to cars or engines simply engaged in interstate commerce. In each section, except Sec. 4, some further limitation appears. In some of the sections it is required, in addition, that the equipment be used in 'moving interstate traffic.' Others use language more comparable to that used in [the Boiler Inspection Act]. But with the exception of Sec. 4, each of the sections in Chapter 1

> of Title 45 U. S. C. A. clearly and without ambiguity indicates that it is to apply only when the car is in use on the line or in moving traffic. This, by necessary implication, excludes such sections when the equipment is removed from the line and placed in a roundhouse for temporary or more serious repairs."

In the case at bar, one of petitioner's duties was to render the locomotive in a condition which would comply with the provisions of the Boiler Inspection Act when it was again placed in use. He is claiming a remedy under the Boiler Inspection Act for the existence of a defect which it was his duty to correct so that the locomotive might conform to the standards imposed by that act.

This dilemma might have been the result of a strict application of the Boiler Inspection Act had Congress not studiously avoided it by limiting its application to locomotives *in use* and *in the active service of such carrier.* Since there is an unqualified duty to maintain locomotives in use in a condition which is not unsafe for those who are required to use them in active service, Congress logically contemplated that a locomotive could only be placed in such a condition of safety by taking it out of use and effecting proper repairs and services.

In *Chicago & N. W. Ry.* v. *United States,* 168 Fed. 236, 238 (8th Cir. 1909), it is said:

> "The object of the safety appliance statutes was manifestly to require interstate carriers to maintain their rolling stock in a certain condition of safety. It could not have been the intention of Congress to impose this duty upon carriers, and at the same time deprive them of the only practical method of meeting its requirements. Rolling stock must necessarily become defective, within the terms of these statutes, both by use and by accident * * *. The only practical method of railroading requires that such vehicles,

when out of repair, shall be taken to the shops; and if they are wholly excluded from commercial use themselves, and from other vehicles which are commercially employed, they do not fall within any of the classes covered by the safety appliance acts. A carrier may move one or more cars by themselves to repair shops, for the purpose of having them placed in a condition to conform to the safety appliance acts, without being guilty of a violation of those acts while thus engaged in an honest effort to meet their requirements."

During the time that equipment is withdrawn from use for servicing or repairs, a carrier's duty is limited to one of ordinary care under the general provisions of the Federal Employers' Liability Act.

Attention is invited to the interesting comments made by the Supreme Court of Utah in *Ehalt* v. *McCarthy*, 104 Utah 110, 138 P. 2d 639, 644 (1943):

"* * * we do not believe that it was within the contemplation of the Boiler Inspection Act to include an engine whose dangerous condition was itself due only to the failure of those charged with operating the engine to so attend to the very fundamental duty of supplying the water needed to run the engine."

and at page 645:

"* * * The carrier has the duty to supervise and inspect and to see that such equipment is not permitted to be used on its line in active service until the potential danger is removed."

and again at page 646:

"* * * A danger created by the non-attention or neglect incident to operation which does not produce an engine defective in itself constitutes the basis for an action, not under the Boiler Inspection Act, but under other sections of Title 45. * * * The danger being one incidental to operation rather than one which becomes

> an attribute of an engine so as to make it unnecessarily perilous to life and limb, as meant by the Boiler Inspection Act, the action would have to be brought under the Federal Employers' Liability Act, * * *."

It is clear that the Boiler Inspection Act has no application to the case now under consideration by this Court, and since petitioner waived all charges of ordinary negligence, we submit that the Court of Appeals was correct in holding that the trial court should have directed a verdict for the respondents.

PETITIONER'S CASES DISTINGUISHED.

Counsel for petitioner have not even attempted to distinguish any of the cases relied on by the Court of Appeals in support of its decision. Those cases clearly are not distinguishable from the one presently at bar. Furthermore, none of the decisions relied on by petitioner supports his position. He has resorted to twisted interpretations of numerous decisions which have no relevancy here, in an obvious attempt to mislead.

The following are the cases relied on by petitioner, and the reasons why they are not in point:

Brady v. *Terminal R. R. Assn.*, 303 U. S. 10 (1938). This Court's statement of facts at page 13 distinguishes that case from this one, for there we learn that "the car had been brought into the yard at Granite City, and placed on a receiving track temporarily pending the continuance of transportation. If not found defective, it would proceed to destination; if found defective, it would be subject to removal for repairs. *It is not a case where a defective car has reached a place of repair.*" (Emphasis added.) The Supreme Court distinguished this case, for the reasons stated, from two of the cases on which we rely: *Baltimore & O. R. R.* v. *Hooven*, 297 Fed. 919; and *New York, C. & St. L. Ry.* v. *Kelly*, 70 F. 2d 548. We submit that the *Brady* case, far from bolstering petitioner's position, is authority for the correct ruling of the court below in the case at bar.

Johnson v. *Southern Pacific Co.*, 196 U. S. 1 (1904). Obviously, this case is not in point, for the dining car had not been withdrawn from service for repairs or servicing. The coupler involved in this suit under the Safety Appliance

Act failed to couple automatically *during a switching operation.*

Louisville & N. Ry. v. *Botts*, 173 F. 2d 164 (8th Cir. 1949). The first sentence of the opinion eliminates this case from consideration, for there we find that the plaintiff, a switchman, was injured when he slipped off a footboard of a moving switch engine as he was attempting to mount it. The accident occurred in the midst of a switching movement [fourth full paragraph, p. 166] in which the defective engine was being used.

O'Donnell v. *Elgin, Joliet & E. Ry.*, ... U. S. ....., 94 L. Ed. 170 (1949). This case also is not apposite, because in it the switchman was injured while engaged in a switching operation. The car or cars involved had not been withdrawn from service. The holding of the Supreme Court in this case was that the plaintiff was entitled to a peremptory instruction that to equip a car with a coupler which broke *in the switching operation* was a violation of the Act. The Court certainly did not hold, as petitioner contends, that the mere *ownership* or *loan* of a defective locomotive or car which is not in use violates the Safety Appliance or Boiler Inspection Act.

Lilly v. *Grand Trunk R. R.*, 317 U. S. 481 (1943). Here again the plaintiff, a brakeman, was injured when he fell from the top of a locomotive tender while he was pulling a water spout over the tender's manhole. The opinion of the Supreme Court does not clearly so indicate, but by reference to the opinion below, 312 Ill. App. 73, 76, 37 N. E. 2d 888, it will be seen that the locomotive was engaged in switching operations; that the engine crew was aboard and operating the engine. That was not a case where the locomotive had been withdrawn from use for servicing, and abandoned while that work was in progress.

North Carolina R. R. v. *Zachary*, 232 U. S. 248 (1914).

Counsel state, at page 53 of their brief, that this case involved the Safety Appliance Act. That is not so. Our copy of 232 U. S. indicates that the question involved was whether plaintiff's right to recover was based on the Fellow Servant Act of North Carolina or on the Federal Employers' Liability Act; *i. e.*, whether at the time of the accident the employee, who stepped in front of a *moving switch engine*, was engaged in state or interstate commerce. Since both respondents in this *Lyle* case have admitted the interstate commerce allegations of the complaint, and that phase of the matter is not at issue, we have no idea why counsel cited this case at least three times in their brief.

Chicago, G. W. R. R. v. *Schendel*, 267 U. S. 287 (1925). While the train, upon which decedent was working, was on the main line a drawbar pulled out of a car. Thereupon the crew chained that car to the one immediately ahead. The whole train was then pulled on to a siding with the intention of detaching the damaged car and leaving it there. The decision has no bearing, because it was while in the act of detaching the crippled car from the train that the decedent was injured.

Minneapolis &c. Ry. v. *Goneau*, 269 U. S. 406 (1926). The accident in this case, like the one in *Schendel* just referred to, happened when a brakeman, in an endeavor to couple a train where it had parted between two cars *while en route*, due to a defect in one of the automatic couplings, went between the ends of the cars, lost his balance, and fell from a bridge on which the cars had stopped.

Fort Street Union Depot v. *Hillen*, 119 F. 2d 307 (6th Cir. 1941). The defective club car involved in this suit was one of a number of cars which had composed a Wabash passenger train which had arrived in the station prior to the accident, and was standing on a track in the yards next the one on which plaintiff was riding when he sustained his injury. There is no indication that the club car was

undergoing either repairs or servicing, and the case is not in point.

Erie R. R. v. *Russell,* 183 Fed. 722 (2d Cir. 1910). Here the defective car was standing on a track in the switch yard. The forepart of the opinion, which counsel quote at page 57 of their own brief, shows why the case is not in point:

> "The car with the defective coupler was not withdrawn from use. Although billed to the repair shop, it was not sent there, nor was it sent to any place used especially for making repairs."

Texas & Pacific Ry. v. *Rigsby,* 241 U. S. 33 (1916), and *Great Northern Ry.* v. *Otos,* 239 U. S. 349 (1915), are cited by counsel as being to the same effect as *Erie R. R.* v. *Russell.* In *Rigsby* the accident occurred *during a switching movement* in taking some bad order cars to the shops, there to be repaired. In *Otos,* the plaintiff was a switch foreman injured while breaking up a train "which had come into his state from the west." The third paragraph of the opinion, p. 351, aptly discloses why the case is inapposite here, for it says:

> "* * * [The car] had not been withdrawn from interstate commerce, but merely subjected to a delay in carrying it to its destination. At the moment of the accident it was accessory to switching the Duluth car."

CONCLUSION.

In the trial court, at the close of all the evidence, the petitioner concluded that there was insufficient proof to support his allegations of ordinary negligence under the Federal Employers' Liability Act, and therefore withdrew them and submitted his case solely on his allegation of the Boiler Inspection Act violation (Tr. 170, 171). Ac-

cordingly, the trial court gave no instructions dealing with negligence under the Federal Employers' Liability Act, and charged the jury solely as to the alleged violation of the Boiler Inspection Act (Tr. 171). Petitioner did not object to the charge.

The Court of Appeals correctly interpreted the law and applied it to the evidence in this record. Since the locomotive clearly was not in use in active service at the time of the accident, the provisions of the Boiler Inspection Act were not applicable. Obviously, a carrier must occasionally withdraw its locomotives and cars from use so that they may be placed in such condition as will make them conform to the absolute requirements of the Safety Appliance and Boiler Inspection Acts.

The straightforward and well-reasoned opinion of the United States Court of Appeals for the Seventh Circuit (Tr. 181, *et seq.*) is clearly right. That opinion is not in conflict with any other decision on the same matter; neither is it in probable conflict with applicable decisions of this Court. We have cited and quoted from the only ten federal and state opinions which have decided the question. In each of those cases the decision has been in line with the one now under attack, and in six of them certiorari was sought but consistently denied by this Court.

For the reasons set out in this brief, the respondents pray that the writ be denied.

Respectfully submitted,

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